

RESPONSE TO CAROLL – PRESIDENT OF THE VICTORIAN MENTAL HEALTH TRIBUNAL

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In his rejoinder to our recent contribution to the *International Journal of Mental Health and Capacity Law*,¹ Carroll suggests that our criticism of the day-to-day operation of the Victorian Mental Health Tribunal (which we based on review of its statement of reasons) is invalid because, in his words, it is premised on a “fundamental misinterpretation” of the *Mental Health Act 2014* (Vic) (the Act).² Specifically, Carroll rejects our view “that in order to ensure treatment is provided in this least restrictive way, the Tribunal must have careful regard to the decision-making capacity of people brought before it and only authorise the involuntary treatment of a person over their competent objection in very limited circumstances”.³

Carroll’s objection to our interpretation seems to be based on a belief that our view depends on reading (or importing) words into the Act’s statutory provisions. As a consequence, the bulk of his rejoinder is concerned with why this would not be justified. Unfortunately, Carroll has not grasped that our view of the way that the Tribunal should perform its functions in the relevant regard does *not* depend on reading words into the Act, but rather is based upon a reasonable interpretation of the what the Tribunal should do based on the Act’s actual wording. We read the provisions and made judgements as to what ought to be the proper approach of the Tribunal, taking account the Act’s objects and principles, the intention of the Parliament, the impact of human rights legislation and the United Nations Convention on the Rights of Persons with Disabilities⁴, and the approach taken by an appeal Tribunal which overturned one of the Mental Health Tribunal’s decisions. Carroll’s response does not actually address any component of our analysis.

Ultimately statutory interpretation is an area where reasonable minds can, and frequently do, differ. Carroll’s understanding of the way that the Tribunal should operate is understandable, but does not, in our view, reflect the best reading of the legislation. Interested readers may return the detailed analysis presented in our paper and review it in the light of Carroll’s criticism. Ultimately, though, the matter can only be decided by a Court.

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¹ Christopher Maylea and Christopher James Ryan, ‘Decision-Making Capacity and the Victorian Mental Health Tribunal’ (2018) 24 *International Journal of Mental Health and Capacity Law* 87.

² Matthew Carroll, ‘Rejoinder (Response to Article by Christopher Maylea and Christopher Ryan)’ (2018) 24 *International Journal of Mental Health and Capacity Law* (2018) [3-8].

³ Christopher Maylea and Christopher James Ryan, ‘Decision-Making Capacity and the Victorian Mental Health Tribunal’ (2018) 24 *International Journal of Mental Health and Capacity Law* 87, [89].

⁴ United Nations [UN] 2515 UNTS 3, UN Doc A/Res/61/106, Annex, GAOR 61st Session Supp 49, 65. (Adopted) 13 Dec 2006, (Opened for Signature) 30 May 2007, (Entered Into Force) 3 May 2008.

The Act provides that questions of law arising from proceedings before the Tribunal may be referred to the Victorian Supreme Court, but only with the consent of the President.⁵ Since many agree with the interpretation of the Act presented in our peer-reviewed paper, the wisest course of action would be to allow a referral of the issue to the Court. At the very least, this would provide some clarity for the Tribunal's members, which, as we reveal in the second part of our paper, approach this matter inconsistently.

Irrespective of the question of statutory interpretation, Carroll makes no effort to respond to this issue of inconsistency - the Tribunal sometimes *did* consider a person's capacity when making decisions. The rejoinder also makes no mention of the ways in which our research identified how the Tribunal is considering capacity as evidence of mental illness. Nor does it address the Tribunal's practice of using assessments of capacity (often confused with 'poor' judgement or lack of 'insight') to determine if a person has a mental illness which itself risks maintaining the myth that all people with serious mental health problems lack capacity. This omission, pared with the admission that the Tribunal has so far operated without guidance from a consumer advisory group, reinforce the issues we raise in our article. People who are able to make their own decisions should be allowed to do so and must be supported in this.

⁵ *Mental Health Act 2014* (Vic) s 197.